# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>July 27, 2010 |
| v | No. 291631<br>Kent Circuit Court |
| ANTHONY DWAYNE TYLER,<br><br>Defendant-Appellant. | LC No. 08-009511-FH |

Before: MURRAY, P.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*), and conspiracy to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*); MCL 750.157a. Because defendant has not established that he is entitled to relief based on the contents of the prosecutor's closing argument, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On the evening of August 29, 2008, Grand Rapids Police Detective Thomas Bush and two other undercover police officers were conducting a narcotics investigation in an area known for high drug activity when they saw defendant and an alleged coconspirator, Roy Smith, in the parking lot of a party store. The undercover officers pulled into the lot. Bush "exchanged nods" with defendant, who approached the officers' truck. Defendant asked, "what are you lookin' for, cocaine, marijuana, what [?]" and Bush answered that he was looking for cocaine. Smith approached and asked if the officers were looking for a "fifty." The officers, defendant, and Smith continued a conversation. Smith asked to borrow a phone, and one of the other detectives loaned him one. Smith made a phone call request for a "fat fifty" to an unknown third person, a request that Bush took to mean $50 worth of cocaine. Smith told the other person on the line where to meet them. Defendant and Smith got into the back of the truck, and both men directed the officers to the location. Once near the location, Smith had the officers stop, and got out to walk to the seller, while defendant remained in the truck. The phone rang and defendant spoke with the supplier. Defendant told the officers to drive the truck to a nearby street and park. Defendant asked the officers whether he was going to "get anything off" of the fifty, told the officers "that's my boy" or "that's my guy down there" and assured them that what the officers were buying was "good stuff." Smith returned, and he and one of the other officers, Detective Maureen O'Brien, walked to the corner. O'Brien handed $50 dollars to Mario Holland, and Holland spit a package of cocaine out of his mouth and handed it to her. O'Brien signaled that the transaction had been completed, and an arrest team arrived and took defendant, Smith, and

Holland into custody. The substance provided by Holland to O'Brien field-tested positive for cocaine. The parties stipulated to the admission of a Michigan State Police laboratory report that stated that the substance contained .247 grams of crack cocaine.[1]

On appeal, defendant maintains that he is entitled to a new trial based on prosecutor misconduct. Defendant did not object to the prosecutor's statement during rebuttal argument. We review this unpreserved claim for plain error affecting defendant's substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). To avoid forfeiture under the plain error rule: (1) the error must have occurred; (2) the error must have been plain, meaning clear or obvious; (3) and the plain error had to prejudice the defendant by affecting the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). However, even when we find plain error, we will reverse only when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings regardless of a defendant's innocence or where the error resulted in an actually innocent defendant's conviction. *Id*. In addition, we review claims of prosecutorial misconduct on a case-by-case basis, evaluating each alleged improper remark in context. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). Improper remarks may not require reversal if they address issues raised by defense counsel. *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003). "Further, we cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect." *Callon*, 256 Mich App at 329-330.

During closing argument, defense counsel repeatedly argued that defendant, who was alternately charged under an aiding and abetting theory, was merely present during the transaction, and did not participate in it. Counsel maintained that Smith and Holland were the coconspirators, and tried to minimize the extent of defendant's involvement by arguing that defendant was simply along for the ride and, apparently, the free beer that Smith had placed in the truck. Counsel admitted that defendant initially went over to the truck containing the officers when they called to him, but then argued that Smith pushed defendant out of the way to complete the deal. Counsel also argued that defendant's conversation with the officers during the ride to Holland was simply defendant "talking trash" to calm the undercover officers down, presumably due to Smith's prior reputation.[2]

During rebuttal, the prosecutor offered the following:

> Now, [defense counsel's] argument is that his client was merely present, and passive acquiescence is not enough for a conviction on this. It was more than passive acquiescence. Was it a tremendous amount more? No, I'm not gonna

[1] The police taped this incident. The audiotape was played for the jury but was not transcribed into the record. The audiotape was entered into evidence. A partial transcript of the audiotape, allegedly containing the exchange between Bush and defendant, was not entered into evidence, but copies were made available to the jurors.

[2] Apparently, Smith was rumored to have been involved in a murder, although the circumstances were not revealed at trial.

> stand here and argue that he was the principal player here. It's just like in the bank robbery example. If Bonnie and Clyde go into the bank to rob it and Bonnie is just standing there near the door with a gun and Clyde's doing all the work, Clyde's got the gun to the teller's face, pointing the gun at somebody, reaching into the cash machine, grabbing the cash, pocketing the cash, running out, [defense counsel is] saying that Bonnie is not guilty, even though she was there, she knew what was going on, and she offered some assistance, whether it was, well, maybe the extra gun there would discourage somebody from doing something, even though Bonnie didn't do anything at all except stand there. She was assisting. And a little bit guilty, Ladies and Gentlemen, is like a little bit pregnant, you either are or you're not.
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> Again, Ladies and Gentlemen, the amount of assistance or help is irrelevant. What it is, if anything, is a sentencing consideration, for the Judge to decide. There isn't any reasonable doubt that the defendant is guilty of aiding and abetting the delivery of this cocaine and guilty of conspiracy to deliver that cocaine. There's no reasonable doubt at all. The level of his guilt in comparison to Mr. Smith and Mr. Holland is for the Judge who has listened to the entire trial. All right? That's a sentencing concern for him to use to establish what the appropriate sentence would be and the Judge has a wide array of sentencing options available to him. The Judge has been doing this longer than almost any other judge in this county. He knows what an appropriate sentence would be. Sentencing will play no part in your deliberations. I'm asking you to find the defendant guilty of both counts.

The trial court instructed the jury that it should not let possible penalties influence its decision. The trial court gave this instruction both before and after trial. This instruction was correct. See *People v Goad*, 421 Mich 20, 27, 36-37; 364 NW2d 584 (1984). Despite defendant's arguments to the contrary, we view the substance of the prosecutor's rebuttal as a similar, perhaps inartful, caution, along with an argument that the jury should not find defendant innocent simply because he was the "little fish," which was a direct response to defense counsel's closing arguments. Defendant appears to be perturbed about the fact that his sentence wound up being longer than the sentence imposed on Smith or Holland. However, defendant's dissatisfaction with his sentence does not transform the prosecutor's comments into an improper urging to the jury that it should convict defendant because he would likely receive a lenient sentence. In addition, to the extent that the prosecutor's argument could have been read as such, a prompt objection and a further curative instruction would have removed any prejudice. *Callon*, 256 Mich App at 329-330. In any event, the prosecution presented ample evidence of defendant's involvement with the drug sale, at a minimum, as an aider and abettor. On this record, defendant has not shown that he is entitled to relief.

Affirmed.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher